

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 515

F. A. SMITH MANUFACTURING CO., INC.,
Petitioner,

vs.

SAMSON-UNITED CORPORATION.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

Opinions of the Courts Below.

The opinion of the United States District Court for the Western District of New York, which is not reported, appears at page 489 of the record. The opinion of the Circuit Court of Appeals for the Second Circuit appears at page 518 of the record and is reported in 130 F. (2d) 525.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

2. The date of the judgment of the Circuit Court of Appeals for the Second Circuit, which petitioners seek to have reviewed, is August 28, 1942 (R. 535).

Statement of the Case.

The essential facts of the case are stated in the accompanying petition for writ of certiorari.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is issued are that the Circuit Court of Appeals for the Second Circuit erred:

1. In holding the claims in issue of Samuels Patent No. 2,095,223 valid and infringed.
2. In failing to hold the claims in issue of Samuels Patent No. 2,095,223 invalid.
3. In failing to hold the claims in issue of Samuels Patent No. 2,095,223 not infringed.
4. In failing to hold that the alleged invention of Samuels Patent No. 2,095,223 did not require the exercise of inventive ingenuity but merely mechanical skill and, therefore, invalid as lacking in invention.
5. In failing to hold that the alleged invention of Samuels Patent No. 2,095,223 involved merely a substitution of material and that the patent was, therefore, invalid as lacking in invention.
6. In failing to hold that A. O. Samuels was not the original and first inventor of the subject matter of Samuels Patent No. 2,095,223.

Summary of Argument.

THE POINTS OF ARGUMENT WILL FOLLOW THE REASONS RELIED
UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

ARGUMENT.

1. The decision of the Court of Appeals of the Second Circuit in holding the petitioner's accused rubber fan blade assembly an infringement of the patent in suit, has enlarged the invention (if any) of the patent in suit beyond that disclosed by the patent itself. This being clearly in derogation of the fundamental holding of this Court in the case of *Schriber-Schroth Co. v. Cleveland Trust Company*, 305 U. S. 47-57.

The accused structure which is held to infringe comprises a fan blade assembly in which the hub and blades are all made of rubber and cast or molded in one piece by one molding operation so that each fan blade is given the desired curved or cupped shape and is integrally formed with the rubber hub (Deft's Ex. 76).

If a rubber blade of the accused fan assembly be severed along the juncture of the blade with the hub, the blade retains its curved shape (R. 501).

The fan blade assembly of the patent in suit is a composite structure. The hub or nosepiece is made of metal in which are formed curved slots. The fan blades are made of rubber and have shoulders formed on both sides adjacent their lower edge.

As pointed out in the specification of the Samuels Patent:

"The blades are made substantially flat and uniform in cross section" (R. 321, Col. 2, Line 48).

When the blades are assembled with respect to the hub, they are retained in the slots by the engagement of the

shoulders on the blades against the inside of the hub and in addition, and this is very important, *the slots in the hub cause the fan blade to be conformed to a cupped shape.*

As pointed out in the Samuels specification,

“The slots 2, 2 in the casing thus hold each fan blade against endwise and outward movement on the casing and at the same time hold the bases of the blades curved or cupped” (R. 322, Col. 1, Line 10).

It is now pointed out that in the Samuels specification and drawing, no other means or expedient is described or even hinted at for attaching to the hub and cupping the fan blades, except the expedient of arcuate slots in the hub and rubber blades formed with shoulders at their lower edge.

It is clear that the genius of construction of the accused integrally formed hub and blade assembly is distinctly different from that which is disclosed by the Samuels patent.

Second Circuit Court of Appeals.

PRIOR CONSIDERATION OF SAMUELS PATENT.

The Samuels patent, here in suit, has twice before been before the Court of Appeals. First, in the case of *Samson-United Corporation v. Sears, Roebuck & Company, Inc.*, 103 Fed. (2d) 312, and later in the case of *Samson-United Corporation v. Emanuel et al.*, 109 Fed. (2d) 922.

In the Sears-Roebuck case the Court made several statements concerning the invention disclosed in the Samuels patent, as follows:

“That it was not new to use rubber, as well as other pliable materials for making fan blades, is shown by the British Patent No. 3,203 granted to Siemens Brothers & Co. Ltd., in 1899.”

“While the mere use of rubber in making fan blades was no invention, the use of a flexible material, which

might of course be rubber, in the way the patentee taught how to use it to obtain the desired results by attaching it in his way to the hub to increase its utility as a fan blade without destroying in any appreciable way its inherent safety qualities, was what the patent law is designed to protect." (Italics ours.)

"These desirable features were obtained by using flexible blades which, when cupped by insertion into arcuate grooves in the hub, were of sufficient rigidity to withstand the axial thrust required for rotation against air * * *. Another important feature of construction was a rib at the base of each blade which extended outwardly from the plane of the blade on each side to overlap the inner edges of the sides of the slots in the hollow hub into which the blades were inserted," etc. (Italics ours.)

In the Emanuel case the Court remarked concerning the Samuels patent:

"The patent specifications were drawn to an electric fan like those then in common use with the exception of the blades which were made of rubber or other resilient material so cupped by having their bases inserted in arcuate slots in the fan hub that they were given sufficient ability to displace air satisfactorily," etc. (Italics ours.)

"We were careful to place the emphasis before, not on the use of rubber or any other resilient materials for fan blades, but on the way such blades were attached to the hub to give them their new and desirable characteristics."

"It is true that metal fan blades of the shape the blades of the patented fan assumed when put into the hub slots were old and so was the method of attaching them to the hub by tabs put into holes and twisted over. But when rubber blades were used it took more than a mere change of material from metal to rubber and needed what the patentee disclosed to make them satisfactory. He did it by embedding the rubber base

of the blade in the metal of the hub in a slot so shaped that pressure would deform the blade as desired."
(Italics ours.)

In both the Sears-Roebuck case and the Emanuel case, the accused structures were held to infringe. In both these cases the accused structures were two-part structures, that is to say, the metal hub and fan blades were independently made. Mechanical instrumentalities were used to fasten the fan blades upon the hubs, which instrumentalities served not only to fasten the blade to the hub but also to conform the rubber blade to assume a dished shape.

In the Sears-Roebuck case the Court said concerning the accused structure:

"The hub is made in two pieces with arcuate slots when the separate parts are joined and with depressions into which the buttons on the blades fit. When the blank of blades is placed in proper position between the two parts of the hub and those parts are joined together the assembled fan is equipped with blades of flexible material so curved by the distortion of the bases in the arcuate slots of the hub and held there against centrifugal force by the embedded buttons that a fan having the peculiar characteristics of the patented fan is the result."

In the Emanuel case the Court said concerning the accused structure:

"He (Samuels) did it by embedding the rubber base of the blade in the metal of the hub in a slot so shaped that pressure would deform the blade as desired. The defendant has done it by embedding a piece of metal, later to be made virtually a part of the hub, in the rubber base of the blade. To put metal into the rubber instead of the rubber into the metal is not enough to avoid infringement." (Above parenthesis added.)

Judge Frank, in his dissenting opinion in the instant case, stated:

"In the earlier cases, this court in sustaining validity, did so, on the narrow basis of the patentee's use of 'slots'; and there are no 'slots' in the alleged infringing device here."

"Some (not all) of these factors are recognized in the majority opinion. In effect, that opinion says that our prior decisions sustaining this patent are of little relevance here; and it sustains the patentee's validity and finds infringement on the basis that Samuels invented a fan with a distinctive shape given to the rubber blades. The majority concedes that there was no invention in rubber blades. The pivotal factor in the majority opinion is the shape of Samuels' blades. Yet the majority also, to some extent, recognizes—although it does not highlight that fact—that the shape of the blades was copied by Samuels from the Gilbert metal-bladed fan."

The patent showing the Gilbert fan is found at page 370, of the Record, and a commercial embodiment of the Gilbert fan was introduced in evidence as defendant's Exhibit 75.

The majority opinion of the Second Circuit Court of Appeals states, on this subject, the following:

"The several prior art patents which were not considered in our previous opinions which are now relied on will be discussed following a restatement of the scope of the patent to dissipate any idea that it is limited to the mere method of the attachment of demountable fan blades to the hub or that the avoidance of that feature is a by-pass of the entire patent."

"What Samuels did show, however, was a conformation which was a means of attaining sufficient rigidity in the blades so that they would keep their shape and utility; look like fan blades when the fan was not in operation—an important selling feature—while at the same time the requisite softness was preserved to prevent damage to a solid object coming into contact with the revolving blades themselves."

Very clearly, therefore, the Court of Appeals for the Second Circuit has by its majority opinion enlarged the scope of the Samuels patent over what it had before considered such scope to be in its prior decisions.

In effect, the opinion of the Court of Appeals gives Samuels a patent on a flexible blade having a "conformation" which provides its shape and at the same time preserves its flexibility and prevents damage if the blade, during its rotation contacts with a solid object.

This very safety feature, in a different shape of fan blade, is clearly disclosed in French Patent No. 375,817 (R. 478 and 481).

A perusal of the specification and drawings of the Samuels patent in suit clearly shows that the scope now given to that patent by the Court of Appeals of the Second Circuit transcends the disclosure of the patent itself. The Samuels patent discloses a fan in which the blades are individually formed and assembled upon a hub or nosepiece, by inserting the lower portions of the blades in arcuate slots and the provision of shoulders upon the lower edges of the blades which prevent the fan blades from flying out by centrifugal action during the rotation of the fan.

The blades are *conformed* to their cup shape by the curvature of the arcuate slots.

Granted that every patent is entitled to a range of equivalents, it is axiomatic that such range of equivalents must come within the scope of the disclosure of the patent itself.

The practical result flowing from the decision of the Court of Appeals, in the instant case, is that nobody can manufacture a curved rubber bladed fan without infringement of the Samuels patent regardless of whatever means or expedient may be employed to attain the curved shape of the blade.

Clearly this is too broad an interpretation of the Samuels patent and not justified by the disclosure of that patent.

This is particularly true in consideration of the fact that the prior art commercial Gilbert fan discloses a blade which has a shape and curvature almost precisely the same as that of the fan blade shown in the Samuels patent.

And further, as will be subsequently pointed out, the origin and development of the shape and form of the fan blade of the Samuels patent was predicated upon and copied from the commercial Gilbert fan.

2. That the Circuit Court of Appeals for the Second Circuit has sustained as valid a patent and has construed the claims of such patent so broadly that the patent dominates the entire market for curved rubber bladed fans and due to the size and importance of the market embraced within the Second Judicial Circuit, it is exceedingly difficult, if not impossible, as a practical proposition, for the rubber bladed fan industry to operate within this market. Respondent can thus maintain, practically speaking, entire domination of the rubber bladed fan industry without bringing suits outside of the Second Circuit. Thus it is improbable that a conflicting decision will occur in another circuit.

From the point of view of the fan industry, the manufacture and sale of rubber bladed fans is materially stifled, if not prevented, due to the fact that the area comprised by the Second Judicial Circuit is so extensive and controlling with respect to the retail sale of rubber bladed fans that a manufacturer deprived of an opportunity to sell within the territory embraced in the Second Circuit, would find himself in a commercially impossible situation.

3. The decision of the Court of Appeals for the Second Circuit in this case, is in apparent conflict with the decisions of the Supreme Court in *Cuno Corporation v. Automatic Devices*, 314 U. S. 48; *Altoona Publix Theaters Inc., v. American Tri-Ergon Corporation*, 294 U. S. 477; and *Florsheim v. Schilling*, 137 U. S. 64, on the question of what

constitutes invention. There is no controversy but that the following statement of fact is clearly established.

In 1935 the Samson-United Corporation was engaged in the manufacture of electric goods such as toasters, waffle irons and kindred devices employing the principle of electric heating.

Abe O. Samuels, the patentee of the patent in suit, was actively associated with that Company as its President.

One Marion W. Humphreys was employed as an engineer by the K-W Ignition Company of Cleveland, Ohio, which Company was seeking outlet for an electrical motor suitable for food mixers, fans, etc., which they were prepared to manufacture. Humphreys was acquainted with Samuels and through certain correspondence Humphreys learned that the Samson-United Corporation contemplated increasing their line to include electric fans of the type suitable for home and office use. As a result of this correspondence Humphrey, together with Albert S. Hanson an official of the K-W Ignition Corporation, called upon the Samson-United Corporation at their plant in Rochester, New York, upon the 15th day of August, 1935. There they met Mr. Samuels and other persons connected with the organization of the Samson-United Corporation for the purpose of discussing the matter of the possibility of the K-W Ignition Corporation selling to the Samson-United Corporation electric motors for use in the electric fan which was in contemplation by the Samson-United Corporation.

At the time of this conference and during the conference, there was considered by the parties present a metal fan then on the market known as the Gilbert fan (Defendant's Ex. 75), and also a fan then on the market known as the Deal fan (Defendant's Ex. 60).

Samuels stated that he wanted a fan which would do away with the use of a guard, customarily used with metal bladed fans, to protect against injury by the accidental

thrust of the hand of a person, into the path of the rotating metal blades.

The commercial Gilbert fan which they had before them was a metal bladed fan and required the use of a fan blade guard.

The Deal fan, on the other hand, employed loops of fabric as the air moving elements and since these elements were not metallic, they would not injure the hand of a person who might accidentally thrust his hand into the path of the air producing elements of the fan and therefore the fan elements required no guard.

Samuels' objection to the Deal fan was that the blades were "too floppy" and were not satisfactory because it did not look like a fan.

According to the testimony of Samuels, he, Samuels, wanted Humphreys to take the Gilbert fan and reproduce the blades in rubber and fasten them to the hub by "appropriate screws, rivets or the like."

There is some conflict of testimony between Humphrey (who is supported by the testimony of Hanson), and the testimony of Samuels as to who first suggested the use of rubber blades for the fan. But beyond that there is no question but that as a result of the general discussion of the Deal fan, the Gilbert fan, and the matter of rubber blades, that Humphreys agreed to endeavor to produce a rubber bladed fan, taking the Gilbert fan as a basis and substituting for the metal blades of the Gilbert fan, rubber blades of essentially the same shape and curvature.

Humphreys did produce such a fan having rubber blades which were curved and were of essentially the same size and configuration as were the metal blades of the Gilbert fan, and the blades were assembled on the nosepiece or hub of the fan by means of arcuate slots and shoulders on the lower edges of the rubber blades in precisely the manner which is shown in the Samuels patent in suit. As a matter

of fact, the testimony shows that a model fan produced by Humphreys was used by Samuels as the basis of his patent application which eventuated in the patent in suit.

Thus we see that whether Samuels or Humphreys be credited as the originator or inventor of the rubber bladed fan of the patent in suit, the fact is that the fan of the patent in suit is precisely like the hub of the commercial Gilbert fan and the rubber blades were copied as to size and cup shape from the fan blades of the Gilbert patent.

It is contended that what was done, as set forth above, did not involve invention but only mechanical skill.

Rubber bladed fans were old in the art as is stated by the Court of Appeals for the Second Circuit in the Sears-Roebuck case and also in the Emanuel case. Therefore, to merely copy in rubber the blade of the commercial Gilbert fan, and secure such rubber blade to the metal hub, involved only mechanical skill and not invention.

In the case of *Cuno Corporation v. Automatic Devices* (supra), this Court stated:

“It has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art.”

Humphreys was skilled in the art. The evidence clearly showed that he had been associated with companies in the manufacture of metal bladed fans and had even experimented with flexible bladed fans which were made out of rubberized fabric.

In the case of *Altoona Publix Theaters Inc. v. American Tri-Ergon Corporation* (supra), this Court said:

“The patentees brought together old elements, in a mechanism involving no new principle, to produce an old result, with greater uniformity of motion. However skillfully this was done, and even though there

was produced a machine of greater precision and a higher degree of motion constancy, and hence one more useful in the art, it was still the product of skill, not of invention.”

In the instant case, the originator of the specific fan assembly shown in the patent in suit merely borrowed from the prior art the use of rubber for a fan blade and utilized it in precisely the same manner, as to size and curvature, as that which had been established in the art by the commercial Gilbert fan.

Even the manner of attaching the rubber fan blades to the metal hub set forth in the patent in suit, is clearly suggested and pointed out in the commercial Deal fan where the flexible air producing elements are attached to the hub by means of slots in the hub and a shoulder on the flexible air producing member which cooperates with the slot in the hub to secure the ends of the air producing member against flying outwardly under centrifugal action when the fan is operated.

In another aspect, the fan construction set forth in the patent in suit involved merely the substitution of one material for another. Actually, in the development of the fan in suit a rubber blade of essentially the same size, shape and curvature was substituted for the metal blade of the commercial Gilbert fan.

This Court has said in the case of *Florsheim et al. v. Schilling* (supra),

“but the substitution of one material for another, which does not involve change of method, nor develop novelty of use, even though it may result in a superior article, is not necessarily a patentable invention.”

As before stated, the use of rubber for the blade of a fan was not new or novel at the time the patent in suit was applied for.

In addition to the foregoing we would point out that in the prior art there is a patent to one Carlson, granted in 1921 (R. 458), which discloses a fan blade assembly consisting of a hub and curved blades which were "cast as an integral structure." From the disclosure in the patent the fan blade assembly was cast in metal.

Could it be said to involve invention to cast in rubber, instead of metal, the fan blade assembly shown in the Carlson patent? We assert that the answer must be in the negative. And yet the Court of Appeals for the Second Circuit in holding the accused structure as an infringement of the Samuels patent has concluded that such a procedure would involve invention.

The prior art also contains the patent to Read, No. 4391, granted in 1871 (R. 468), in which there is shown a propeller which comprises a hub with radiating curved blades which are integrally cast in rubber, the patent stating,

"The vulcanized rubber, while very strong, is yet slightly elastic, so that if sprung out of form by any extraordinary force it will, when that pressure is removed, resume its original shape without breaking,"

The hub and blade construction of the Read patent while not directly in the art relating to air fans is, nevertheless, in an analogous art.

The prior art patent to Aulsing, No. 2023113 (R. 443), is interesting as disclosing an integral metal fan blade assembly made as a stamping, including a hub portion and radiating curved or cup shaped blades.

4. The Court of Appeals of the Second Circuit has erred in its failure to give full faith and credit to the evidence and testimony of witnesses produced to sustain the contention that the patentee was not the true and original inventor of the alleged invention in the patent in suit on the ground that the alleged prior originator or inventor (if it

be an invention) had not sooner asserted his claim, thus, in effect, precluding relief not only against the alleged infringer but also relief to the public from the asserted monopoly. This action of the Court of Appeals is asserted to be in conflict with the pronouncement of this Court on similar subject matter in the case of **Altoona Publix Theaters, Inc., v. American Tri-Ergon Corporation** (*supra*).

We have before pointed out the circumstances under which the alleged invention of the patent in suit was originated.

Shortly after Samuels filed his application for patent, which eventuated in the patent in suit, Humphreys became acquainted with the fact that Samuels had made such filing.

Humphreys did not at that time set forth any claim on his part that he was the originator and inventor of the subject matter of the rubber bladed fan in question and explains the situation by giving two reasons. First, he did not consider that the fan which he had developed was a patentable invention and second, inasmuch as his employer, the K-W Ignition Company, were seeking to obtain an order for motors and shortly thereafter did actually obtain an order for motors from the Samson-United Corporation for use with the fans in question, his employers advised against entering into any controversy with Mr. Samuels which might interfere with or injure their business relations with the Samson-United Corporation.

Humphreys therefore never asserted his own claim to being the originator or inventor (if there be an invention), with respect to the fan disclosed by the patent in suit, until after the institution of the suit by Samson-United Corporation against the petitioner.

The testimony of Humphreys and his corroborating witnesses was practically entirely taken by way of deposition and the majority opinion of the Court of Appeals is in error

in stating that the District Judge "had the benefit of observing the witnesses."

In the District Court, the Judge, in his opinion (R. 492), stated, as his reason for denying consideration of the testimony as to Humphreys' origination of the fan of the patent in suit, the following:

"His failure to assert against either the plaintiff or Samuels any claim of ownership of the invention or to voice any objection against Samuels' claimed ownership until the present suit is strong evidence that Humphreys was not the inventor and that he never believed himself to be the inventor. This evidence is not overcome by his now belated claim when circumstances have changed, when the patented fan has long since attained success on the market, when the plaintiff as owner of the patent has already borne the expense of three infringement suits to sustain its validity and to demonstrate infringement and when Humphreys is now employed by the manufacturer who supplies the defendant with hub and blade assembly for the accused fan. Under the circumstances as disclosed in this case *the evidence tending to show that Humphreys was the first inventor cannot prevail.*"

Evidently the District Judge was at least convinced that there was evidence "tending to show that Humphreys was the first inventor," but that for the reasons assigned, which seemingly was Humphreys' delay in asserting his origination of the subject matter of the patent in suit, the Court decided that such evidence "cannot prevail."

The Court cited the case of *Holley Hill Citrus Growers' Association et al. v. Holley Hill Fruit Products, Inc.*, 75 Fed. (2d) 13-17, as "singularly apropos." This case states as follows:

"There is a kind of evidential estoppel which, though it may not amount to a complete estoppel in pais, is raised when persons who have spoken or acted one

way under one set of circumstances, and with one objective in mind, undertake under other circumstances and when their objective has changed, to testimonially give a different color to what they formerly said and did."

It will thus be seen that clearly in the mind of the District Judge, he was invoking a species of estoppel against Humphreys.

In the instant case Humphreys is not a party to the suit. He and other witnesses who support his testimony were called to give testimony on behalf of the defendant.

The instant case is not one wherein Humphreys is seeking to recapture and claim for himself an invention which he had "let slide."

Moreover, it should be noted that the Court's remark concerning the fact that the plaintiff has already borne the expense of three infringement suits, has no pertinency in the instant case since there is absolutely no testimony that Humphreys had anything to do with these cases or even knew that they had been filed or tried.

Your petitioner (defendant), and the general public whom he represents, have a very real interest in whether the Samuels patent is a valid patent and, therefore, it was improper for the District Court to, in effect, invoke the doctrine of estoppel with respect to the testimony of Humphreys and his corroborating witnesses, because to do so was directly against public interest.

In the case of *Paramount Publix Corporation v. American Tri-Ergon Corporation*, 294 U. S. 464-477, the Supreme Court considered a situation which was similar in principle though differing in detail to that which is involved in the instant case. In the Paramount case, the lower Court had decided that the petitioner was estopped to deny the validity of the patent there involved in suit because petitioner, or one standing in privity with him, had filed an applica-

tion in the Patent Office for the subject matter as the patent in suit, which had been rejected by the Patent Office.

This Court said:

“However inconsistent this early attempt to procure a patent may be with petitioner’s present contention of its invalidity for want of invention, this Court has long recognized that such inconsistency affords no basis for an estoppel nor precludes the Court from relieving the alleged infringer and the public from the asserted monopoly when there is no invention.”

In the case of *Lorenz et al. v. Colgate-Palmolive-Peet Company*, 122 Fed. (2d) 875-880, the Circuit Court of Appeals for the Third Circuit had under consideration a case which involved an action under 4918 of the revised statutes.

In that case the defendant in the lower court had urged invalidity of the patent and the plaintiff contended that the defendant was estopped from denying the validity of the plaintiff’s patent because the defendant was the owner of an interfering patent and also there had been an interference proceeding in the Patent Office which had involved the question of originality.

The Court said:

“Any possible estoppel of parties would be without relation to the court’s power to declare a patent invalid upon sufficient showing or its duty to exercise such power in an appropriate case. * * * In any event, it would seem that, in a suit involving patent validity, the operation of the doctrine of estoppel could extend no further than to the private rights of the interested parties inter se, and certainly not to the right of (patent) monopoly in which the public has an interest. * * * Over and above the defendant’s private rights or lack of them, the defenses here alleged are material to the question of the Lorenz patent’s validity which is directly in issue under the plaintiff’s bill of complaint.”

The Court of Appeals for the Second Circuit by their opinion have, in effect, upheld the action of the District Judge in applying what amounts to an estoppel with respect to the testimony of Humphreys and his corroborating witnesses.

In connection with the foregoing discussion, we would invite this Court's attention to the dissenting opinion of Judge Frank, and particularly that portion of his opinion which relates to the Humphreys testimony (R. 533).

Respectfully submitted,

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